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Exhibit 23

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION**

**M.D.L. No. 1456
Civil Action No. 01-12257-PBS**

Judge Patti B. Saris

REPORT OF INDEPENDENT EXPERT

PROFESSOR ERNST R. BERNDT

TO JUDGE PATTI B. SARIS

FEBRUARY 9, 2005

relationship between these list prices and actual acquisition costs is “constant” over time.

Specifically, when introducing the National Association of Chain Drug Stores PRIME price index for the “Top 200 drugs by 1991 dollar volume sold through community pharmacies” based on Medi-Span list price data, he wrote:

“Even though the AWP does not represent the actual price paid by pharmacies for drug products, there is typically a constant relationship between these list prices and the actual acquisition cost for most pharmacies. Manufacturers nearly always raise their list prices and their actual transaction prices to traditional community pharmacies at the same rate. Manufacturers’ price change patterns have been monitored to identify and adjust for those cases where list prices and direct prices appear to have changed at a different rate.”¹¹³

77. Part of the continued confusion apparently emanates from statements made by First DataBank, a publisher of AWP prices. For example, in the September 1991 issue of a First DataBank’s publication, in an article entitled “Understanding AWP”, the following definition appears:

“AWP represents an average price which a wholesaler would charge a pharmacy for a particular product. The operative word is average. AWP never means that every purchase of that product will be exactly at that price. There are many factors involved in pricing at the wholesale level which can modify the prices charged even among the same wholesaler. AWP was developed because there had to be some price which all parties could agree upon if machine processing was to be possible.”¹¹⁴

78. Essentially the same definition of AWP is given today. For example, the American Society of Consultant Pharmacists’ website contains an “AWP Briefing Room” backgrounder on “AWP Changes for intravenous, inhalant and injectable Medications” in which information is

¹¹³ Stephen W. Schondelmeyer, “The NACDS *PRIME* Index: Tracking Changes in Drug Prices”, prepared for National Association of Chain Drug Stores, August 14, 1992, pp. 1-2. Italics in original. I note that elsewhere Professor Schondelmeyer has stated that the meaning of price terms have changed over time. See, for example, Schondelmeyer and Wrobel [2004], *supra*, p. 13.

¹¹⁴ *First DataBank Monthly Interest*, “Understanding AWP”, Vol. 6, No. 9, September 1991, p. 1. FDB-AWP 28850-28852.

given "on how AWP is calculated" by First DataBank ("FDB"). This internet search process yielded the following statement:

"I have many conversations regarding what is 'AWP' and how does FDB determine it. There is much folklore and misunderstanding as to the determination of AWP and where we get the data.

AWP is the average wholesale price. That is, AWP is the average of the prices charged by the national drug wholesalers for a given product (NDC). The operative word is **average**. AWP was developed to provide a price that all parties could agree upon for electronic processing to be possible.

In order to determine the AWP, First DataBank surveys national wholesalers to ascertain what they use as a price basis in their AWP files. We contact the wholesalers to determine what the markup should be for a new company or to confirm that the markup that we are applying is current. A survey may be performed on a single NDC number or for a manufacturer's entire line of products. In either case, each national wholesaler is surveyed on a number of products from each manufacturer.

The number of surveys performed is increasing. First DataBank surveys drug wholesalers that represent over two-thirds of the wholesaler total dollar volume. The markup that First DataBank utilizes is representative of wholesalers on a national level. Because individual wholesalers may mark up each manufacturer differently, a weighted average, not a consensus average, is calculated. That is, the market share held by the wholesalers surveyed affects the markup proportionally. Wholesalers with higher drug dollar volumes have more weight in the determination of the final markup. Thus, a higher degree of certainty is achieved. We also consider the manufacturer's suggested wholesale price (SWP) in our determination."¹¹⁵

79. At the First DataBank website "Frequently Asked Questions", under the question "How does First DataBank determine the Net Wholesale Price, Direct Price and Blue Book AWP as published in NDDF Plus and PriceProbe?", the following statement was retrieved in January 2005:

"The Net Wholesale Price (also known as the wholesale acquisition cost or wholesale price) represents the manufacturer's published price for a drug product

¹¹⁵ *Average Wholesale Price*, as found on the American Society of Consultant Pharmacists website, with a note this was last modified on 06/05/00. Online at <http://www.ascp.com/public/ga/awp/awpinfo.shtml>, accessed 1/22/2005. Boldface in original.

to wholesalers. The Direct Price represents the manufacturer's published price for a drug product to non-wholesalers.

First DataBank defines the 'Blue Book Average Wholesale Price,' which is commonly used as AWP, as the average of prices published by wholesalers to their customers for a given product. To determine Blue Book AWP, First DataBank typically identifies the Net Wholesale Price (or in some cases, the Direct Price) of a product, and then surveys the full-line national wholesalers to determine the average mark up applied to the manufacturer's line of products or a specific product. Such surveys may be conducted at the request of our customers or when a change in the marketplace occurs (such as a merger of manufacturers) which might occasion a change in prices. First DataBank does not include regional wholesalers or specialty distributors in its survey.

First DataBank's Blue Book AWP is not intended to represent the wholesale price suggested by the manufacturer. Instead, First DataBank reports the manufacturer's suggested wholesale prices in a separate data field known as 'SWP.' In some cases, if manufacturers do not sell to wholesalers or if wholesalers agree with the manufacturer's suggested wholesale price, the Blue Book AWP and SWP may be the same.¹¹⁶

80. Two further examples illustrate factors contributing to the continuing confusion and ambiguity concerning AWP. First, in the 2000 edition of Novartis' Pharmacy Benefit Report, an industry trade publication, the glossary defines AWP as follows:

"Average wholesale price (AWP) -- A published suggested wholesale price for a drug, based on the average cost of the drug to a pharmacy from a representative sample of drug wholesalers. There are many AWP's available within the industry, AWP is often used by pharmacies to price prescriptions. Health plans also use AWP -- usually discounted -- as the basis for reimbursement of covered medications."¹¹⁷

Second, a more recent widely cited California HealthCare Foundation report (prepared by a well-known health care consulting firm) contains the following glossary definition:

"Average wholesale price (AWP) -- A list of benchmark prices set by averaging across the spectrum of prices charged to pharmacies by wholesalers for both brand-name and generic drugs. The current list price is published in recognized

¹¹⁶ First DataBank "Frequently Asked Questions". Accessed online at http://www.firstdatabank.com/customer_support/faqs, on January 20, 2005.

¹¹⁷ Novartis Pharmacy Benefit Report: Facts & Figures, 2000 Edition, East Hanover, NJ, Novartis Pharmaceuticals Corporation, p. 43.